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5 IN THE UNITED STATES DISTRICT COURT
6
7 FOR THE NORTHERN DISTRICT OF CALIFORNIA

8 NETWORK APPLIANCE INC,

No. C-07-06053 EDL

9 Plaintiff,

**ORDER REGARDING OCTOBER 10,
2008 JOINT LETTER BRIEF**

10 v.

11 SUN MICROSYSTEMS INC,

12 Defendant.

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14 On October 10, 2008, the parties submitted a joint letter brief raising a discovery dispute that
15 arose during the depositions of Charles Milligan and George Rudeseal. Having reviewed the letter
16 brief, on this limited record without the benefit of further background information or legal authority,
17 the Court concludes as follows:

18 (1) Charles Milligan: although Mr. Milligan went on answer some questions at his
19 deposition, he did not answer others after being instructed by counsel not to answer. The
20 instructions not to answer were excessive in failing to distinguish between communications on the
21 subject of business advice and those on the subject of legal advice and failing to allow exploration of
22 the former. See, e.g., Milligan Dep. 188:14-23; 206:7-12. Even though business advice and legal
23 advice do overlap somewhat in the context of the strategies raised at Mr. Milligan's deposition, they
24 are not completely coextensive, and the former is a proper subject of inquiry, even if it involves
25 communications with an attorney. "Calling the lawyer's advice 'legal' or 'business' advice does not
26 help in reaching a conclusion; it is the conclusion. . . . What matters is whether the lawyer was
27 employed with or without 'reference to his knowledge and discretion in the law,' to give the
28 advice." U.S. v. Chen, 99 F.3d 1495, 1502 (9th Cir. 1996) (quoting 8 J. Wigmore, Evidence § 2296

1 (McNaughton rev. ed. 1961)). Also, the Court is inclined to the view that Mr. Milligan can testify
2 generally as to his job duties and the basic strategies at issue, without breaching the attorney-client
3 privilege, although details of the strategies, such as potential litigation, might be privileged.

4 (2) George Rudeseal: it appears likely that the instructions to the witness were justified,
5 although if he or anyone else had any role in setting his hourly rate beyond what he was told to do
6 by Sun's counsel for litigation purposes, he should answer the question.

7 As Sun has represented that it has agreed to make the witnesses available for further
8 deposition, the parties shall meet and confer about those depositions in light of the Court's
9 instructions. Furthermore, if NetApp contends that Sun improperly withheld documents, the parties
10 shall meet and confer in light of this order. If necessary, the parties may file a joint letter brief
11 raising additional issues not addressed here.

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13 **IT IS SO ORDERED.**

14 Dated: October 22, 2008

Elizabeth D. Laporte
15 ELIZABETH D. LAPORTE
United States Magistrate Judge